HARVARD

LAW REVIEW.

VOL. XX. FEBRUARY, 1907. NO. 4.

CRUCIAL ISSUES IN LABOR LITIGATION.

Dedicated to Professor Langdell.

I.

"We have said here more than once that these points will never be cleared up till we leave off talking about conspiracy and malice." — 20 Law Quarterly Review 3.

WHEN, if at all, does the law impose liability for preventing the formation, or causing the termination, of business relations, in cases where no breach of contract is involved, and where the methods used do not include defamation, fraud, or force, or reasonable apprehension of force? What constitutes actionable interference with the right to form or maintain business relations?

(1) A attempts to enter into a contract relation with C. B induces C not to form such a relation with A; but does not use defamation, fraud, or force, or threat of force as a method of inducement.

(2) A and C sustain to each other a contract relation terminable at the will of either party. B induces C to terminate the existing relation. *Ex hypothesi* there is no breach of contract on the part of C. Defamation, fraud, or force, or threat of force is not among the methods of inducement used by B.

When, if at all, has A an action against B?[1]

It is proposed to consider some of the points which arise under the above general question, giving especial attention to certain topics arising in so-called "labor litigation." The purpose is to

[1] It is assumed, for the present, that the right or interest of A in (2) is not entitled to any higher degree of legal protection than his interest in (1). But this has been doubted, and the question is not yet settled by authority. See 37 Am. L. Reg. (N. S.) 374; North, J., in Allen *v.* Flood, [1898] A. C. 1, 43, 44.

discuss the question on principle rather than to present a collection and analysis of authorities.[1] But it should be said that the number of decisions necessarily inconsistent with some of our conclusions is much smaller than might be supposed upon a superficial examination of the cases. If we look "to what has been actually *decided*" in many cases rather than "to what has been *said*," it will be found that the present reasoning would not necessarily have led to a different result. For some decisions "better reasons may now be given than were thought of when the decisions were announced."

The primary question is as to the liability of a single man acting independently (*i. e.*, not in concert with others). After this has been settled, and not till then, comes in legal order the question whether members of a combination incur greater liability than a single man. Unfortunately, however, the discussion of the first question has been overshadowed by the discussion of the second. Defendants have, in many cases, been members of a combination, and there has been a tendency to hold them principally on that ground; the court ignoring the question whether a single man accomplishing the same result with the same purpose would have been liable, or perhaps tacitly assuming his non-liability. But in many of these cases it was unnecessary to rest the decision on the element of combination. The damage in question would have been tortious if done by a single individual acting independently.[2] Of course an ordinary individual, in many instances, could not succeed in accomplishing the same damage which has been caused

---

[1] For a critical examination of authorities bearing on various phases of the general question, see the following articles in legal periodicals: Prof. Lewis, 42 Am. L. Reg. (N. S.) 125; 18 HARV. L. REV. 444; Prof. Huffcut, 37 Am. L. Reg. (N. S.) 273; 18 HARV. L. REV. 423; Prof. Ames, 18 HARV. L. REV. 411; Prof. Wyman, 17 Green Bag 21 and 210; 15 Green Bag 208.

[2] "But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of." Romer, L. J., in Giblan *v.* National, etc., Union, [1903] 2 K. B. 600, 619.

"The judges may consider, with a care not yet given to the subject, what acts may be crimes when done by an individual acting alone with a view to interfere with the liberty of his neighbor; . . . May not much conduct even now, which is masked under the euphemism of peaceful picketing, be criminal though pursued only by a single individual?" Prof. A. V. Dicey, National Review, October, 1906, p. 220.

See also Prof. Dicey, in 18 L. Quar. Rev. 4; Lord Lindley, in Quinn *v.* Leathem, [1901] A. C. 495, 537; Fitzgibbon, L. J., in Sweeney *v.* Coote, Ireland [1906] 1 Ch. 51, 109, 110.

by the acts of a combination. But there is no inherent impossibility as to the accomplishment of such damage by a single powerful individual. There have been, and are, instances of single persons having power to accomplish, and sometimes actually accomplishing, damage such as is usually caused by such combinations. One of the questions now looming up is, not whether a combination incurs greater liability than an individual, but whether a combination enjoys greater immunity than an individual (a point to be considered later under the head of justification).

"Half the controversies in the world," said Cardinal Newman, "are verbal ones, and, could they be brought to a plain issue, they would be brought to a prompt termination. Parties engaged in them would then perceive, either that in substance they agreed together, or that their difference was one of first principles. . . . When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless."[1]

We will not affirm that all difficult questions in labor litigation would be instantly solved if words were used with exactness and in only one signification; but it is safe to say that the difficulties of solution would thus be materially diminished. Certainly it is impossible to have any clear discussion of the present subject, unless we either discard certain ambiguous expressions altogether or distinctly indicate the meaning intended to be affixed to them.[2]

The confusion engendered by the use of the word "malice" has been so often remarked upon by the highest authorities that it cannot now be necessary to enlarge upon it, nor to discuss the difference between the popular sense and the legal sense, between "express malice" and "implied malice," between "malice in fact" and "malice in law." It is not the least of the merits of the Indian Penal Code that the use of this word is entirely avoided. In his recent opinion in South Wales Miners' Federation *v.*

---

[1] Newman, Oxford University Sermons, 1890 ed., 200, 201.

[2] The word "strike" is used to describe various kinds of conduct quite distinct from each other. The same is true of the word "boycott."

As to the various meanings of "strike," *cf.* Report of Royal Commission on Trade Disputes, etc., p. 16, art. 66 (3); Dissenting Report of Sir W. T. Lewis, pp. 120, 121; Hammond, J., in Plant *v.* Woods, 176 Mass. 492, 496, 497.

As to the various meanings of "boycott," *cf.* Adams and Sumner, Labor Problems, 197, enumerating "four distinct varieties of boycott," and Mitchell, Organized Labor, 289, 290, as to the distinction between "a direct boycott" and "a secondary boycott."

Glamorgan Coal Co., Lord Lindley said: ". . . it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether and to substitute for it the meaning which is really intended to be conveyed by it." [1]

The words "intent" and "motive" cannot be entirely banished from legal discussions; but the user should always indicate the sense in which he employs them, except where this is unmistakably inferable from the context.[2] At present, "intent" and "motive" are often used interchangeably, as though they were exact equivalents of each other.[3]

The word "intent" is used in at least three distinct senses; to express sometimes one and sometimes another of three things which are really distinct from each other.

1. Intent is used to denote the volition, the exercise of will power, requisite to constitute a muscular movement an act; *i. e.*, to constitute the movement of a man's muscles the act of that man. If the motion of a man's arm is due to spasmodic contraction of the muscles while he is undergoing an epileptic fit, then that motion of the arm is not his act. But a similar motion of the arm due to an exertion of his will power, due to a voluntary contraction of the muscles, is his act.

This signification of intent does not specially concern the present discussion.

2. Intent is used to denote the immediate object, or consequence, or effect, aimed at by the doer of an act; the immediate result desired by the actor.[4]

3. Intent is used, not to signify the object or result immediately aimed at, but to denote the reason for aiming at that object; not to indicate the

---

[1] [1905] A. C. 239, 255. *Cf.* Prof. Ames, 18 HARV. L. REV. 422.

[2] The word "intent" or "intend," as used in the charge and special findings in Leathem *v.* Craig, received conflicting interpretations at the hands of the judges *in banco.* Ireland [1899] 2 Q. B. & Ex. D. 667, 744. *Cf.* O'Brien, C. J., pp. 724, 725, 726, 731; Lord Ashbourne, p. 752; Walker, L. J., p. 768; Palles, C. B., p. 713.

[3] "Nothing is more frequent in jurisprudence than the confusion of motive with intention." 1 Austin, Jurisp., 3 ed., 355.

"During the arguments that have been addressed to your Lordships, I do not think that quite sufficient distinction was drawn between the intention and the motives of the defendants. Their intention clearly was that the workmen should break their contracts. Their motives, no doubt, were that by so doing wages should be raised." Lord James of Hereford, in South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239, 252.

[4] It will be noticed that intent is here used in Markby's sense of "desire," and not in Austin's sense of "expectation." *Cf.* Markby, Elements of Law, 3 ed., §§ 217, 220, 222, and 1 Austin, Jurisp., 3 ed., 433.

result immediately desired, but the cause for entertaining that desire, the feeling which makes the actor desire to attain that result.

To illustrate the distinction between 2 and 3, take the following case:

A republican kills the king. He is actuated, not by ill will to the monarch, but by a patriotic desire to promote the welfare of the country. Being indicted for intentionally killing the king, he says that his intention was not to kill the king but to benefit the country.

Of course this defense would not avail. It confounds intent and motive (or, if we use the word "intent" in both cases, it confounds immediate intent with ulterior or ultimate intent). "But the nature of the consequences" immediately "intended, and the nature of the motive which gave birth to the intention, are objects which, though intimately connected, are perfectly distinguishable." [1] ". . . and the causes of intention are called motives." [2] "The intention is the aim of the act, of which the motive is the spring." [3] Intention "is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition." [4] It is illogical to "argue that a man did not entertain a given intention because he had a motive for entertaining it." [5]

Take another case, where there is not a single act, but a series or succession of acts, all prompted by one and the same ultimate motive:

It is impossible to kill the king without first killing the sentinel at the palace door. A republican, in order to carry out his purpose of killing the king, kills the sentinel; and then, having thus gained admission, kills the king. He is friendly towards the sentinel and has no personal ill will towards the king. His reason for desiring the death of the king is his belief that the monarch's death will promote the welfare of the country. Being indicted for intentionally killing the sentinel, he says that his governing intention was not to kill the sentinel but to kill the king.

This defense, again, cannot be maintained. When he says that he did not desire the death of the sentinel, he means only that

---

[1] Bentham, Principles of Morals and Legislation, c. IX, ¶ XIII.
[2] *Ibid.*, c. VIII, ¶ XIII, and c. XI, ¶ XXVIII.
[3] 1 Austin, Jurisp., 3 Eng. ed., 165.
[4] 2 Stephen, Hist. of Crim. Law of Eng., 110.
[5] *Ibid.*, 111–112.

he did not desire that result for its own sake. But he certainly did desire it as a means to the end of attaining his ultimate object. "The ulterior intention of one wrongful act may be the commission of another"; [1] but that does not necessitate the conclusion that there was no immediate intent in doing the first act, that there was no immediate consequence aimed at in the doing of the first act. It cannot be maintained "that the presence of an ulterior intention takes away the primary immediate intention." [2]

Compare also the following instances in labor litigation where intent and motive are confounded:

(*a*) Defendant denies intent to harm plaintiff, when he really means only to deny a bad motive for the intent. Defendant means that he did not do harm to the plaintiff "for the sake of the harm as an end in itself," but "merely as a means to some further end legitimately desired." [3]

(*b*) Defendant justifies on the ground of self-interest. Plaintiff attempts to rebut by alleging bad motive, and seeks to sustain allegation by proof simply of intent to harm. In many of these cases the defendant's motive or ultimate intent is in itself a perfectly good one; namely, a desire to promote his own welfare or that of his union. [4]

It must now be apparent that the ideas described in 2 and 3, *ante*, p. 256, differ from each other; and that infinite confusion must ensue if the same word or phrase is used to denote both. [5]

---

[1] Salmond, Jurisp., 418. "A person may pursue an immediate end merely as a means to a more remote one, and that in turn as a means to one still further on; and thus any given act or omission may be regarded as directed to the attainment of a series of ends of different degrees of remoteness." Terry, Leading Principles of Anglo-American Law, § 192.

[2] 2 Stephen, Hist. of the Crim. Law of Eng., 112.

As to cases where either the immediate intent or the motive is "complex instead of simple," where the act is done with the intent of simultaneously bringing about two immediate results, or where the doer is actuated by two concurrent motives, see 1 Bishop, New Crim. Law, §§ 339, 340, and Salmond, Jurisp., 418, 419.

[3] "True, the defendants contend and testify that their purpose was to benefit their own members. This, doubtless, in a sense, is true, but the benefits sought were the remote purpose which was to be secured through the more immediate purpose of coercing the plaintiffs into complying with their demands or otherwise injuring them in their business, and the court cannot, in this proceeding, look beyond the immediate injury to the remote results." Purvis *v.* Local, etc., 214 Pa. St. 348, 359.

[4] Whether a really bad motive (such as personal ill will to the plaintiff) would destroy an otherwise sufficient justification, is a question to be considered later. The point to be noticed now is that in many labor disputes this question does not arise, inasmuch as the motive, or ultimate intent, is not bad. See Mr. Justice Holmes, 8 HARV. L. REV. 8; and Prof. Ames, 18 HARV. L. REV. 418, n. 3.

[5] For an example of using "motive" to cover both ideas, reference may be made to the question recently suggested "concerning a soldier, who, after taking aim, fired

Different words or phrases must be used for each. What these words or phrases shall be is not a matter of supreme importance, although a general agreement of lawyers as to phraseology might save much time which would otherwise be devoted to explanation of the meaning of terms. For ourselves we propose to use the word "intent" to denote the ideas expressed in 2, and "motive" to denote the ideas expressed in 3. If one prefers, he may use "immediate intent" as to 2, and "ulterior intent" or "ultimate intent" as to 3;[1] or new words or new combinations of words may be invented.[2] But whatever expressions are employed, their meaning should be clearly stated, and their use should be consistent throughout the discussion.[3]

Taking the terms "intent" and "motive" in the significations we have given them, intent is frequently material upon the question of the actor's liability in tort, whereas the cases where motive is material are comparatively rare. Bad motive is not generally a requisite element in making out a *primâ facie* case. Good motive does not, alone and of itself, constitute a justification for the intentional infliction of harm.

Recurring now to the direct consideration of the question stated at the beginning of this article, the first inquiry is as to the nature of the plaintiff's interest or right which he claims has been infringed.

In some quarters it almost seems to be assumed that an interest or right must be absolute, or else it cannot exist at all. If the right is not fully protected, it is treated as practically non-existent. *E converso*, if it is admitted to exist at all, then it is assumed that it must necessarily be fully protected. But the analogies of the

---

off his rifle in time of battle, whether his predominant motive was to help his country or hurt his enemy." Here we should say his intent was to hurt his enemy, his motive was to help his country.

[1] See Mercier, Criminal Responsibility, 45.

[2] Prof. Dicey uses the word "object" instead of "intent." In 18 L. Quar. Rev. 2, he says: "This distinction between motive and object may be called a fine one, but it is a real distinction and corresponds with the dictates of common sense." To this the editor, Sir Frederick Pollock, adds: "Moreover it is at least as old as Aristotle's Ethics." But see Chalmers-Hunt, Trade Unions, IV, V.

[3] "Nobody is at liberty to censure men or communities of men for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meaning appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other." Maine, Hist. of Early Institutions, 7 ed., 374.

law do not justify this view. As every one knows, there are interests or rights which are highly protected and other interests which are only moderately protected. There is the almost absolute protection given to a landowner against the physical entry of others on his land, and there is the comparatively limited protection given to the same man against the institution of an unfounded criminal prosecution.

When A sues B for inducing C to refrain from entering into a contract relation with A, just what is the right in A which he claims has been infringed by B?

It is not a right to compel C to contract with him. Indeed it is not a right against C at all. It is a right against third persons that C should be left reasonably free to contract with A; that no improper means should be used by them to restrain C from contracting with A.[1] "The peculiar element of the newly recognized[2] right is that it is an interest which one man has in the freedom of another."[3] It is a right to a reasonably free market, freedom on both sides of the market, freedom on the part of both buyer and seller of goods and labor.[4] ". . . a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."[5]

It may be said that when C declines to enter into a contract with A, A "loses nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him."[6] This may be true as between A and C; but *non constat* that A is remediless against B, if B's unlawful interference prevented C from entering into a contract which he

---

[1] "It must be constantly borne in mind that the purpose of this action is not to compel the manufacturers, against their will or disposition, to sell their goods to the plaintiff, but its purpose is to enjoin the association, its active members, committees, and agents, from compelling manufacturers or dealers against their will to refuse to sell their property to the plaintiff, by a system of intimidation and boycotting." Dissenting opinion of Martin, J., in John D. Park *v.* National, etc., 175 N. Y. 1, 42.

[2] Better "newly formulated."

[3] Stevenson, V. C., in Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 765.

[4] See Stevenson, V. C., in Atkins *v.* Fletcher Co., 65 N. J. Eq. 658, 664, and also in 63 N. J. Eq. 766.

[5] Lord Lindley in Quinn *v.* Leathem, [1901] A. C. 495, 534.

[6] "He could not have sued the Gibson Mill for discharging him at the end of the day. How, then, can he sue the defendant company for procuring the Gibson Mill to do something which it had the legal right to do?" Connor, J., in Holder *v.* Cannon Mfg. Co., 138 N. C. 308, 309.

would otherwise have made with A. It may be within C's legal right, as against A, to refrain from doing a certain act, but it does not necessarily follow that it is within B's legal right, as against A, to induce C to refrain.[1] The existence of this right or interest claimed by A against third persons is conclusively established by the cases which hold B liable to A where B has, by force, prevented C from entering into business relations with A.[2] The only question is, how fully does the law protect the interest which it thus clearly recognizes? Is it protected only against methods of the kind denominated "intrinsically unlawful," or is it protected against other methods which exceed the proper limits of economic struggle?[3]

There are two views, which represent opposite extremes:

One view is that there is a specific right which the law protects as fully as the right to have one's land free from invasion. Any interference, by any method, with my right to have other persons left free to contract with me is not only a *primâ facie* tort, but a tort which can seldom be justified. The "right" is not to be violated with impunity, unless under circumstances as exceptional as those required to justify an entry on real estate, or at least as exceptional as those required to justify the inducing of a third person to break his contract.[4]

Another view is that the mere fact of successful interference does not *per se* give a *primâ facie* cause of action. There is no action unless the method of interference is in itself an actionable tort, *e.g.*, force. On this theory the law takes notice of my violated right so far as to include it as an element in the assessment of damages when a tort has been committed apart from the caus-

[1] In Jacobs *v.* Cohen, 183 N. Y. 207, it was held that an employer could not avoid a note given to secure the performance of his contract with a union to employ exclusively union workmen. But it does not necessarily follow that the union might not be liable to a non-union workman thus prevented from obtaining employment, if any unlawful means were used to induce the employer to enter into the contract for exclusion. "Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment, by a third person who made the contract with his employer." Knowlton, C. J., in Berry *v.* Donovan, 188 Mass. 353, 357.

[2] Lord Halsbury, in Allen *v.* Flood, [1898] A. C. 1, 71, 72.

[3] The limit of a plaintiff's right, the extent to which the law will protect it, may be marked out by stating how far a duty is imposed on a defendant to respect that right, to refrain from interfering with it.

[4] See the opinion of Cave, J., in Allen *v.* Flood, [1898] A. C. 1, 29, 34, 36; and also the comments of Prof. Lewis, 42 Am. L. Reg. (N. S.) 149.

ing of this damage. But the law does not regard the damaging violation of this "right" as constituting in itself a substantive cause of action. This is the view advocated by Mr. Cohen in his memorandum accompanying the Report of the Royal Commission on Trade Disputes and Trade Combinations, pp. 24-30. He discusses the question, "Is a person liable for doing any act which, though not in itself an actionable tort, amounts to an interference with or molestation of another person in his trade, business, or employment?" This question he answers in the negative; quoting largely from the opinions of some of the Law Lords in Allen *v.* Flood. A majority of the Commissioners in their Report, article 66 (4), recommended the passage of an act, "To declare that an individual shall not be liable for doing any act not in itself an actionable tort only on the ground that it is an interference with another person's trade, business, or employment." [1]

It is submitted that the truth lies between these two extremes.

The plaintiff's right in such a case is not a specific right of the kind fully protected against all interference. It is, however, included in the broad general right that a man shall not be intentionally damaged by any one unless there is a justification.[2] The proposition under which the action should be allowed is a wide proposition, not concerned solely or specially with the right to acquire property or the right to be free from interference in the formation of business relations.

General formulas have been laid down which cover torts in general, and in their application are not confined to this particular class of cases.

"At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." Bowen, L. J., in Skinner *v.* Shew.[3]

---

[1] According to the Solicitors' Journal for Nov. 17, 1906, the Trade Disputes Bill, which had passed the House of Commons and was then before the Lords, contains a clause "which excludes liability in trade disputes where there has been an inducement to a person to commit a breach of contract, or where there has been an interference with some person's business or employment, or his right to dispose of his capital or his labor as he wills."

[2] See 22 L. Quar. Rev. 118.

[3] [1893] 1 Ch. 413, 422.

In Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 613, the same judge said: "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse."

This differs from the statement in Skinner *v.* Shew in two respects. First, the

"*X*, who intentionally causes *damage* to *A*, has *primâ facie* done an *injury* or wrong to *A*, and if *X* can show no legal justification for the damage he has thus intentionally done to *A*, he is liable to an action by *A*." Professor A. V. Dicey.[1]

"It has been considered that, *primâ facie*, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Holmes, J., in Aikens *v.* Wisconsin.[2]

"It is submitted that the discussion would be materially simplified if it were understood that all damage wilfully done to one's neighbor is actionable unless it can be justified or excused." Sir Frederick Pollock.[3]

"The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage; . . ." Professor Ames.[4]

The above statements of Bowen, Dicey, Holmes, Pollock, and Ames all seem to imply that the causing of the damage in question was the object immediately aimed at by the defendant. But they do not necessarily import the doing of damage "for the sake of the harm as an evil in itself, and not merely as a means to some further end legitimately desired." On the contrary, the desire to cause the harm is entirely consistent with the absence of personal ill will towards the plaintiff, and also with the existence of an ultimate good motive on the part of the defendant. Conceding that damage as such, *i.e.*, because it is harmful or damaging to the plaintiff, is the very object immediately desired, yet it may not be the ultimate end which is sought to be attained.[5]

---

statement in the Mogul case is, as Sir Frederick Pollock points out (22 L. Quar. Rev. 118), "limited in terms to damage to property or trade." Second, the statement in the Mogul case seems broad enough to include damages which, though they might have been foreseen as probable incidental results, were not specifically desired by the doer either as an end or as a means to an end.

The second suggestion would also apply to the proposition enunciated by Judge Holmes, in 8 HARV. L. REV. 9, " . . . when a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification."

[1] 18 L. Quar. Rev. 4. [2] 195 U. S. 194, 204.

[3] Pollock, Torts, 7 ed., 319. See also Sir Frederick Pollock's vigorous criticism of Mr. Cohen's position, "that there is no general rule of law that a person who by some act intentionally does harm to another is *primâ facie* liable to him." 22 L. Quar. Rev. 118.

[4] 18 HARV. L. REV. 412.

[5] See Prof. Terry, in 20 L. Quar. Rev. 22.

We think that the law should be held to go as far as the above general statements of Bowen, Dicey, Holmes, and Pollock, and the more specific statement of Professor Ames; and we believe that these propositions are wide enough to cover a large proportion of the so-called "labor cases" which have come before courts in recent years. But (and this is a consideration which may sometimes have been overlooked) none of the above general formulas can be regarded as containing in themselves a complete statement of the law. Like any other general statement of legal doctrine, they do not stand alone. Each is modified and limited as to its operation by the application of other legal doctrines, so that the resultant force of the whole may bring about a result differing from that which would be reached by the application of any one of the doctrines taken by itself alone.[1] Each of the preceding formulas is subject to the implied exception that the damage and the method of producing the damage must be such as the law will notice and will hold actors responsible for. For various reasons the law deems it inexpedient to afford a remedy for some kinds of damage which cannot be sheltered under the maxim *De minimis*. Certain kinds of conduct and certain methods of exercising so-called "rights" are not regarded as furnishing a cause of action, even though substantial damage results therefrom.

In discussing any specific case the question of *primâ facie* liability should be considered separately from, and prior to, the question of justification. This proposition, so obvious that it seems idle to enunciate it, has sometimes been overlooked, and with unfortunate results. No doubt in this class of cases the great struggle will frequently come on the question of justification; what acts fall within the legal limits of competition; what may justifiably be done in defense of one's own interest. But there can be no rational discussion of justification until we have first settled what sort of conduct requires to be justified and why it so requires. We must first have a clear idea of what constitutes *primâ facie* liability. At present we are liable to have decisions which do not make it plain whether the turning issue was that of the existence or non-existence of *primâ facie* liability, or the existence or non-existence of justification. And decisions may sometimes be based on one of these issues which really should have turned on the other.

[1] See Bishop, Written Laws, § 118*a*.

We now take up a specific case falling under the general subject of this article; a typical labor case which, in some form or other, is not infrequently brought before the courts.

A, who is a laborer, desires to be employed by C. B, a single man not acting in combination with others, induces C not to employ A, whom C would otherwise have employed. Defamation, fraud, or force, or threats of force, are not among the methods of inducement used by B. There is no tort or breach of legal duty on B's part towards C. Nothing is done by B which would give C an action against B for tort or breach of contract. Is B *primâ facie* liable to A? Must B show a justification?[1]

The answer may depend on the nature of the methods used by B, the particular instrumentalities used, to induce the refusal by C.[2]

The methods, other than those which are *ex hypothesi* excluded, may be divided into two main classes; and these again can be subdivided:

Class 1. Where defendant B uses only his own conduct, or his own property, as a lever; and therewith operates directly upon C, the possible employer of the plaintiff A.

Class 2. Where defendant B uses an outsider, or fourth person, as a lever, whereby he operates indirectly upon C, the possible employer of the plaintiff A.

In every case of this sort there are inevitably three parties involved, although only two of them are parties to the litigation. They are (1) the plaintiff, or would-be employee; (2) the possible employer with whom the plaintiff is seeking to contract; (3) the defendant who induces the possible employer to refrain from dealing with the plaintiff. In one sense the possible employer is a third person; *i. e.*, as between himself and the litigating parties, the plaintiff and defendant. By "outsider," or "fourth person," is meant some person other than the plaintiff, the defendant, and the possible employer.

---

[1] It is the same question in principle if C, a would-be employer of A, sues B for preventing A from entering C's employ.

As our hypothesis excludes the use of force or threats of force, we need not consider here the cases as to "picketing," nor the general question as to the unlawfulness of physical conduct or language intentionally causing molestation or annoyance. On the latter question see Stevenson, V. C., in Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 768, 769.

[2] In some cases the report does not distinctly state the method whereby the defendant "induced" another person to cease dealing with the plaintiff.

We now take up cases falling under Class 1, *ante*, and proceed to discuss certain methods which may be grouped in two divisions:

Division A. Simple persuasion exerted directly by defendant on C, the possible employer of plaintiff.

Division B. Temporal inducement. Offer by defendant to possible employer of temporal advantage if he does not employ plaintiff; or threat of temporal disadvantage if he does employ plaintiff.

To consider these different methods in detail:

Division A. In the case of inducement by simple persuasion, we think there should be no action. The law pays high regard to freedom of speech in the absence of fraud or defamation. The question what the law should notice and afford remedy for is one of expediency, calling for a balancing of advantages and disadvantages. The harm likely to be caused by persuasion to refrain from contracting does not appear to be so great as to make it expedient to interfere with the liberty of speech in this respect.[1]

A different case is presented where B consciously persuades C to commit a battery upon A or to break a contract with A. There B instigates C to commit a breach of legal duty owing from C to A. "The act caused by the persuasion being an unlawful act, the act of persuasion becomes unlawful."[2] In such a case the persuader or instigator ought to stand no better than the individual who at his instigation personally commits the breach of duty.[3]

Should an action be allowed for simple persuasion to refrain

---

[1] In cases usually cited under the law of defamation there are some strong instances of denying remedy for harm intentionally caused by speech: *e.g.*, where illness in plaintiff is either caused by the defendant's utterance to others of defamatory words not actionable *per se*, or is caused by the defendant's uttering to the plaintiff, in the absence of third persons, charges which are actionable *per se*.

[2] Prof. Lewis in 42 Am. L. Reg. (N. S.) 137.

[3] In a note to Allen *v.* Flood, in Kenny, Cas. on Torts, 187, it is said: "The student must be careful to observe that the advice here declared to be lawful was not advice to break an *existing* contract (which it would be illegal to break), but only to abstain from creating a new contract (an abstinence which would involve no illegality)."

In South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239, the House of Lords decided that "to break a contract is an unlawful act," and that one who procures another to break a contract also acts unlawfully. See Lord Lindley, p. 253, and Lord James of Hereford, p. 250. The weight of authority in the United States sustains this doctrine.

According to the statement in the Solicitors' Journal for Nov. 17, 1906, quoted *ante*, p. 262, the bill which has recently passed the House of Commons contains a clause reversing the doctrine of the Glamorgan case. Such legislation in any of the American states which have affirmed the same doctrine might be held unconstitutional.

from entering into a contract, if the persuader's ultimate motive were bad? We think not. It does not seem expedient to permit the question of motive to be litigated nor to submit the issue to the decision of a jury. (The materiality of motive will be referred to again later.)[1]

Before considering Division B, as to temporal inducement, allusion perhaps should be made to a method intermediate between simple persuasion and temporal inducement; namely, the threat of discontinuing social intercourse, or more broadly the threat of social ostracism, but not including the threat of any damage in a business point of view. We do not think that inducement by such a method should be actionable. Such seems to be the view of Judge Holmes and Vice-Chancellor Stevenson.[2] Causing social ostracism is not held sufficient special damage to justify an action for untrue defamatory statements not falling within the class of charges actionable *per se*.[3]

We now take up Division B: Temporal inducement; offer by defendant to possible employer of temporal advantage if he does not employ plaintiff; or threat of temporal disadvantage if he does employ plaintiff.

This again may be further subdivided into

(B 1) Where the inducement consists of money or some other tangible object of property.

(B 2) Where the inducement consists in an offer to exercise, or a threat to refrain from exercising, defendant's right to work, his personal right to labor or not to labor.

As to (B 1). Even if the difference between the cases of simple persuasion and pecuniary inducement is held to be only one of degree, this does not necessitate a decision in favor of immunity in the latter case.[4] Judge Holmes has said that most differences

---

[1] Our view is strongly sustained by various opinions in the House of Lords in Allen *v.* Flood, [1898] A. C. 1. There is now some controversy as to what was actually decided in that case. As to this, see Lord Lindley in Quinn *v.* Leathem, [1901] A. C. 495, 533.

For a contrary view as to the effect of bad motive, see Holmes, C. J., in Moran *v.* Dunphy, 177 Mass. 485, 487; Erle, Trade Unions, 23.

[2] Vegelahn *v.* Guntner, 167 Mass. 92, 109; Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 769.

[3] See Roberts *v.* Roberts, 5 B. & S. 384.

[4] " . . . there is no practical impossibility in drawing a line between persuasion by argument and persuasion by the offer of money or a thing of value" (*e.g.*, the exercise of the right to work). 42 Am. L. Reg. (N. S.) 130.

are, when nicely analyzed, only differences of degree.[1] A threat of pecuniary loss, or an offer of pecuniary gain, differs materially from simple persuasion. It is more likely to be effective. If such threats or offers can be indulged in with impunity, there is hardly any limit to the damage which a rich or powerful man can safely cause to his weaker neighbors.[2] Such a threat or offer is an obstruction of the plaintiff's right within the spirit of Sir William Erle's proposition:

"Restraint of the free course for trade in labor by acts of molestation or obstruction, which are not otherwise unlawful, but which operate as hindrances to the exercise of a trade, and which are done for the purpose of such hindrances without justification, seems to me . . . an actionable wrong."[3]

Such threats or offers of direct pecuniary inducement are seldom made except in cases where there is a plausible justification on the ground of competition.[4] Hence the question whether they give rise to a *primâ facie* cause of action has not often been discussed. But we think that the decision in London, etc., Co. *v.* Horn[5] really rests upon the ground that such a threat is *primâ facie* actionable; and this seems correct on principle.

As to (B 2). When the inducement consists in an offer to exercise, or an offer to refrain from exercising, defendant's right to work, his personal right to labor or not to labor.

Take the following illustrative case:

Defendant B, when all employments and engagements are terminable at the will of either party, threatens to leave the employ of C, unless C drops the plaintiff A or refuses to employ A. C is thus induced to drop A or to refuse to employ A.[6]

---

[1] See Rideout *v.* Knox, 148 Mass. 368, 372.

[2] A applies for employment in C's factory. B, who has no interest in C's business, gives C $100 on condition that he refuses to employ A. C is thus induced to refuse A employment.

Has not A a *primâ facie* cause of action against B? Must not B show a justification?

[3] Erle, Trade Unions, 20.

[4] It has been thought that unionist strikers may be justified in paying weekly benefits to laborers who have ceased to work for the strikers' former employer and have joined the union, or in paying other laborers to induce them to refrain from taking the places just vacated by the strikers. See Everett Waddey Co. *v.* Richmond, etc., Union, 53 S. E. Rep. 273 (Va., 1906), and 18 HARV. L. REV. 432. *Cf.* Lord James of Hereford, in Denaby, etc., Collieries *v.* Yorkshire, etc., Ass'n, 95 L. T. R. 561, 566.

[5] 206 Ill. 493.

[6] Or suppose that defendant B offers to enter into the employ of C, on condition that C refuses to hire plaintiff A; and that C is thus induced to refuse to hire A.

It is assumed that the result which followed was the object immediately desired and aimed at by B.

Various good justifications for such conduct on the part of B can easily be imagined. But our present inquiry is not what would constitute a sufficient justification, but whether B is under any obligation to prove a justification. Is there a *primâ facie* cause of action against B?

Unquestionably B has a right not to work as well as a right to work.[1] It may be conceded, too, that these rights are in the nature of property assets. But are they more so than B's right to money in his pocket? If B cannot use his tangible property as an instrument of causing desired harm to the plaintiff A, "without any other justification than the abstract right to do as he pleases with his own,"[2] can he so use his "personal rights"? Are the rights to labor and not to labor so absolute and unqualified that no action can ever lie for damage intentionally caused by their exercise (damage specifically aimed at and desired by the actor)?[3]

In some quarters an affirmative answer might be returned to these inquiries. It might be said: "No matter if the plaintiff had an interest which the law would to some extent recognize and protect. The defendant has violated no duty. He has simply been exercising an absolute legal right. Hence he has not incurred even a *primâ facie* liability, and cannot be called on to justify."

We think that the above proposition, supposed to be taken in behalf of the defendant, is open to several objections, apart from the use of the word "absolute."

1. It assumes that, if certain conduct of B does not violate any legal right of C, it cannot infringe a legal right of A.

2. It overlooks the distinction between unconditionally exercising a right, and offering to exercise it (or to refrain from exercising it) on condition that the offeree shall take action which is intended to produce (and does produce) damage to a third person.

3. It assumes that one who intentionally instigates a second person to inflict damage on a third person can escape responsibility by putting the instigation in the form of a conditional offer to exercise, or to refrain from exercising, a right which he had against the second person.

What is the right to work or not to work? What are its qualifications or limitations? Can a laborer intentionally use this right

[1] See Lord Herschell in Allen *v.* Flood, [1898] A. C. 1, 138.

[2] See 37 Am. L. Reg. (N. S.) 288.

[3] See Prof. Lewis, in 18 HARV. L. REV. 450.

as a lever to induce a second person (a possible employer) to exercise *his* right in a manner damaging to a third person, but not involving tort or breach of contract on the part of the second person? That is, can the laborer so use this right without making himself *primâ facie* liable to the third person; *i. e.*, without being required to show some special justification?[1]

Undoubtedly it is a right as against all the world, against third persons as well as against employers, to refrain from entering into employment or to quit an employment which is terminable at will, without being required to show a special justification and without having to answer to the employer for purpose or motive. And this may include a right to give absolute and unqualified notice of intention to leave.

It may also include, *as against an employer*, a right to annex any possible condition to an offer to work or to a threat to refrain from working. By "right as against an employer" we mean that an employer could not maintain an action against a laborer for annexing such conditions. The employer is not legally damaged by such an offer. He is not bound to accept it. As between B and C, the person with whom B is directly dealing, it may be true that "the right to refuse to deal involves the right to name any terms which one pleases, and to refuse to deal except on these terms." C cannot maintain an action against B for insisting on unreasonable terms. But "the terms or conditions annexed to an offer may relate to the offeree's relations to a third person, and [if the offeree

[1] "But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful. . . .

"What the employees [of the defendant companies] threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies and their managing officers to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose."

Taft, J., in Toledo, etc., R. R. Co. *v.* Pennsylvania Co., 54 Fed. Rep. 730, 737, 738. The above applies more especially to the first case stated on the next page.

accepts and performs the conditions] that may raise a question whether such third person has any ground of complaint."[1]

We think that the right to work or not to work does not include, *as against third persons*, the right to annex any possible condition to an offer to work or to a notice of intention to refrain from work.[2] Suppose that B offers to work for C on condition that C commits a battery on A. Could B effectively deny that he instigated the commission of the battery? Could B escape liability to A on the ground that he was merely stating to C the conditions on which he was willing to exercise his right to labor or not to labor?

Take another case where the damage suffered by the plaintiff, proceeding immediately from the conduct of the offeree instigated by the defendant, has not involved the commission of an actionable tort on plaintiff by the offeree (is not such as to form the basis of an action of tort by plaintiff against the offeree):

B, whose employment is terminable at his will, notifies C that he will cease working for C unless C ceases to sell provisions to A; B knowing that it is practically impossible for A to seasonably obtain provisions from any other source. C thereupon ceases to sell provisions to A, and A suffers the pangs of starvation, as B desired that he should.

The only difference between this latter case and the former one consists in the nature of the conduct instigated by the defendant. In the first case the conduct induced was unlawful on the part of the third person, the offeree. In the second it was not. But this distinction does not affect the fact that the act of C in both cases was due to defendant's inducement. Some courts might, perhaps, exonerate the defendant in the second case on the ground that the act which he instigated was not a tort on the part of the "instigatee" (the offeree). But no court could reasonably exonerate him on the ground that he did not instigate the act of the offeree.

No doubt a man may abstain from work without being answerable for his intent or motive. He may refuse at his pleasure.

---

[1] See 43 Am. L. Reg. (N. S.) 84, 88.

[2] See the recent case of March *v.* Bricklayers, etc., Union, 63 Atl. Rep. 291 (Conn.), stated more fully, *post*, under "Justification." Defendants refused to handle bricks purchased by their employer from the plaintiff, unless plaintiff first paid the union $100. Plaintiff paid, and was then allowed to recover back the payment, which was regarded as an act of extortion both at common law and under the Connecticut statute.

There is no general duty which forbids him to abstain.[1] But in the case now under consideration, B's conduct is not merely negative; it is not pure non-feasance; it is not simply refraining from work, not simply exercising his right to work or not to work. His action is positive, affirmative, and on its face of a decidedly aggressive nature. He is not merely exercising his right to abstain from work. He is attempting to use that right (or rather he is threatening to use that right) as a lever to induce C to take action damaging to A.

B has a right to quit C's employ. C has a right to refuse to further employ A. How can the exercise of two independent rights by separate persons constitute a tort on the part of either? It may be conceded that there can be no action if each exercises his own right without inducement from the other. But here B is not sued for simply exercising a right which he himself possessed. He is sued for inducing another person to exercise a right which that other person possessed, and to exercise it to the damage of the plaintiff.[2] Indeed B has not been exercising his right to quit work. He has, rather, been making a conditional offer to refrain from exercising that right; the condition being that the offeree shall take action which will cause damage to the plaintiff, and the production of such damage being an object specifically desired by B.[3]

---

[1] "The general duty is a negative one only, not to do malicious acts. There is no general duty which forbids a person to abstain from acts even maliciously; generally he may refuse to act at his pleasure." Prof. Terry, in 20 L. Quar. Rev. 20.

[2] See Mr. Justice Wm. O'Brien, in Leathem *v.* Craig, Ireland [1899] 2 Q. B. & Ex. D. 667, 694.

[3] In March *v.* Bricklayers, etc., Union, 63 Atl. Rep. 291 (Conn., 1906), stated more fully *post*, under "Justification," Prentice, J., said: "It is attempted to justify the action of the union in its money demand upon the proposition that, as its members had the right to decline to handle the plaintiff's brick, they had the right to waive the exercise of that right upon such conditions as they might impose. The proposition is that money demanded and obtained as the price of forbearance from the commission of an act of injury, even when the commission of that act is held over the man to coerce and intimidate him into compliance with the demand, is lawfully obtained, if the threatened act was one which the threatener might lawfully do. Such a proposition could oftentimes be used to justify the vilest blackmailer, and is palpably unsound, in that it ignores certain elements which may be present to convert the proceeding into a wrong or crime."

In the case stated in the text, B did not exercise the right of quitting work. He "merely used the potential power to exercise it, as a means of depriving" A of employment (as a means of preventing C from continuing to employ A). See 10 Case and Comment 137.

For an authority contrary to our view as to a *primâ facie* case, see Clemitt *v.*

In truth the defendant's right, to work or not to work, is not an absolutely unqualified right. He is entitled to freedom in disposing of his own labor only so far as the exercise of such freedom on his part "can be made compatible with the exercise of similar rights by others."[1] The defendant's right is limited or qualified by the plaintiff's correlative right. The defendant is not entitled to exercise his right in such a manner as to intentionally and unnecessarily prevent the plaintiff from enjoying the plaintiff's right to dispose of *his* labor. The plaintiff is entitled to have a possible employer left reasonably free to deal with the plaintiff. The defendant cannot unreasonably interfere with this right of the plaintiff.

Several objections are likely to be urged against the foregoing views.

It will be said that a man has the absolute right to threaten to do that which he has a right to do.[2] Granted that what you may absolutely do you may absolutely threaten to do (give unqualified notice of your intention to do). But it does not follow that you may conditionally threaten to do it. The right to absolutely refuse to work and the right to conditionally refuse do not, as against third persons, *i. e.*, persons other than the employer, stand to each other in the relation of the greater to the less. The former does not necessarily include the latter. They are distinct from each other; and the latter may sometimes be the more important and the more dangerous right of the two. Some illustrations of the dangers have already been given.

"May not a man," it will be asked, "give reasons for quitting work? Cannot he give reasons to his employer without subjecting himself to an action by a third person?"[3]

The answer is, that his liability may depend on the intention with which he gives the reason. If the so-called "giving of a reason" by B to C is thinly veiled instigation to C to discharge A; if it is, in fact, a veiled offer to remain or to return if A is dis-

---

Watson, 14 Ind. App. 38 (assuming there that defendants notified the employer of their determination to quit unless plaintiff was discharged).

Our view is also opposed to the opinions of several of the Law Lords in Allen *v.* Flood; taking the facts to be as those Lords then understood them.

[1] See Erle, Trade Unions, 12.

[2] See Parker, C. J., in Nat'l Protective Ass'n *v.* Cummings, 170 N. Y. 315, 329; and Holmes, J., in Vegelahn *v.* Guntner, 167 Mass. 92, 107.

[3] See in Allen *v.* Flood, [1898] A. C. 1, Lord Watson, p. 99, Lord Herschell, pp. 130, 139, Lord Shand, p. 166.

charged; if it was given with the desire and expectation of bringing about A's discharge and has accomplished its purpose, then B ought not to escape liability to A on the ground that he has simply been giving a reason for his conduct. If B intended to thereby cause damage to a third person (now plaintiff), B should be put to his justification. Whether the reason was or was not volunteered would not be decisive on the question of intention. The giving of a reason may be withheld at the moment of leaving or giving notice with the idea that it will certainly be asked for, and that it will be more effective if given in answer to inquiry.[1]

It may further be asked why intention should be made a subject of judicial inquiry and a test of liability, when motive is not deemed material. Taking the terms "intent" and "motive" in the significations in which they are used in this article,[2] there is good cause for such a distinction. Intent is easier of proof than motive. There is much less chance of mistake or prejudice in the finding of a jury upon the question of intent than upon the question of motive. "The field of motives," says Mr. Bentham, "is an open and ample field for the exercise, not of mendacity only, but of bias."[3] In civil suits intent is a material issue much more frequently than motive. Defendant's right would be much more impaired if he were compelled to litigate the question of his motive than if he were compelled to litigate only the question of his intention.

An argument like the following is sometimes advanced:

An actual strike against the employment of a man obnoxious to the strikers is frequently more effective than a mere threat to strike. But in

[1] During the argument in Allen *v.* Flood, [1898] A. C. 1, the question was suggested whether a cook is liable to a butler if she induced the master to dismiss the butler by threatening to leave herself if the butler were retained (it being apparently assumed that all employments were terminable at the will of either party). Cave, J. (p. 36), thought the cook liable in the absence of just cause or excuse. Lord Herschell (pp. 138, 139) thought the cook was not liable, and Lord Shand (p. 166) thought her not liable, even though actuated by the motive of personal ill will to the butler. In 18 HARV. L. REV. 419, Professor Ames says that the answer depends on the motive of the cook, who would be liable, if, having no objection to the butler as a companion, she procures his dismissal from pure malevolence. We submit that it would depend upon the intent with which she made the threat. The cook had, of course, a perfect right to leave the service "even from capr ce." But it does not follow that she can conditionally threaten to quit; the conditional threat being uttered with the specific intention of thereby causing the dismissal of the butler. She should be liable in the absence of justification.

[2] See *ante*, pp. 256, 259.

[3] 1 Bentham, Rationale of Jud. Ev., 1827 ed., 145.

case of an actual strike there is no action. Why then should a mere threat to strike be held actionable? [1]

It is a mistake to assume that there can never be an action in the case of an actual strike. *The employer* may have no action against the strikers, if their employment was terminable at their own will. But a *third person* intended to be damaged, and actually damaged thereby, may sometimes have a remedy. If the strikers give the fact that the employer has hired A as their sole reason for quitting, and they seek no new job, their conduct may amount to an offer to return on condition that A is discharged. As already suggested, the fact that the reason was not given until after leaving would not necessarily differentiate the case in principle from that of a conditional threat to leave. In both cases the defendant is using the same "right," with the same purpose and with the same result.

If the preceding views are correct, why does it not follow that *an employer* may sometimes have an action against his striking workmen, although they have not broken any contract? Suppose that workmen whose employment is terminable at the will of either party leave their job in such an unfinished condition as to inevitably entail great loss on their employer C, and that they left with the specific desire of causing such loss. Now if B, a third person, can sue the workmen when they quit working for C with the specific desire of causing B's discharge, why cannot C, the employer, sue the workmen when they quit work with the specific desire of causing loss to him (C)?

The answer is threefold: [2]

First: As against C, the employer, the conduct of the workmen is purely negative, a mere nonfeasance. It is the "discontinuance of a service at will." [3]

Second: One party to a contract is not liable to the other for exercising his contract right against the other party, no matter how bad his motive.

Third (perhaps an application of the last proposition): C could have protected himself against such action on the workmen's part. The relation

---

[1] See 43 Am. L. Reg. (N. S.) 94.

[2] It is here taken for granted that the employer has no action against the workmen; and such was the decision in Karges Furniture Co. *v.* Amalgamated, etc., Union, 165 Ind. 421, 428, 429. See, however, Erle, Trade Unions, 74, apparently tending to the contrary view.

[3] See Prof. Ames, in 18 HARV. L. REV. 416, n. 1, as to the "fundamental distinction between a malevolent act and a malevolent non-feasance."

between C and his workmen is contractual; it arises out of contract. C could have refused to employ the workmen except under a contract for a definite time; in which case he would have had a remedy for breach of contract if they left earlier.[1] Where the relation between the parties is contractual, the law is slow to give either party a remedy in tort against the other for conduct which might have been made the subject of express stipulation in the contract. But in the present case B, the third person, sustained no contractual relation to the workmen. He had no opportunity to protect himself against them by inserting terms in a contract between himself and them; and hence he has not waived any such right.

Are, then, striking workmen *primâ facie* liable for all damage sustained by third persons, which can be traced to their strike as its cause? Must they show a justification for all such damage?

Our argument does not go so far. We are contending that, when they act affirmatively and aggressively, they are *primâ facie* liable for damage to third persons which was immediately aimed at by them, the specific object aimed at, the very result desired. The case may be different as to damage which is merely incidental, the happening of which might have been expected as an incident of the attempt to accomplish that object. Fall River strikers, who exercise their right to quit work, are not liable to Fall River storekeepers for loss of trade which is an incidental result of the strike.[2] It is mere non-feasance to cease working in the factory. If, by reason of defendants' ceasing to work, the operation of the factory is suspended and a trader thereby loses all his customers, the defendants would not be liable (not even, as we think, upon proof that this result was intended).[3] But it is a very different matter when a trader loses the custom of a mill owner, because of the workmen's threatening to stop work unless the owner ceases to

---

[1] "It is said that the company were in the power of the men because of the business loss to which the withdrawal of the men would subject them. But to what was this due, if not to the act of the company themselves in employing these men under a contract which either party might any day determine?" Lord Herschell in Allen *v.* Flood, [1898] A. C. 1, 130.

[2] In the efforts of workmen to better their condition, "they may inflict more or less inconvenience and damage on others. But these results should be incidental damage and inconvenience consequent on the operation of general rules, lawful in themselves, rather than those which follow a specific intent and immediate purpose of injury to others in order that good may ultimately come to themselves." Brown, J., in Purvis *v.* Local, etc., 214 Pa. St. 348.

[3] See Clemitt *v.* Watson, 14 Ind. App. 38, where recovery was denied to a plaintiff thrown out of work by the suspension of business resulting from defendants' quitting work.

deal with the trader. In the latter case the conduct of the workmen is affirmative and aggressive, not merely negative.

Thus far we have been discussing cases falling under Class 1, namely: Where defendant B uses only his own conduct, or his own property, as a lever; and therewith operates directly upon C, the possible employer of the plaintiff A.

We now proceed to cases falling under Class 2, namely: Where defendant B uses an outsider (or fourth person) as a lever, whereby he operates indirectly upon C, the possible employer of the plaintiff A.

When is there a *primâ facie* liability on the part of B?

This will depend upon what the outsider does, and the methods whereby B induces him to do it. (It is assumed that the defendant does not use or threaten to use any means as against the outsider which would give the outsider an action against the defendant.)

Subdivisions of Class 2 may now be considered:

Subdivision (1). Defendant simply persuades outsider to persuade employer not to hire plaintiff.

Subdivision (2). Defendant persuades outsider to threaten to ostracize (to withdraw from social intercourse with) employer of plaintiff.

Subdivision (3). Defendant, by threat of ostracizing outsider, induces outsider to threaten to ostracize employer of plaintiff.

As to subdivisions (1), (2), and (3) under Class 2, we think that there is no *primâ facie* liability; the reasons being similar to those given in regard to the use of similar methods under Class 1, *ante*. True the case under Class 2 is stronger, in that another person is brought into the war; but he is not brought in by methods which are likely to produce serious damage in the majority of cases.

Subdivision (4). Defendant persuades outsider to offer temporal inducement to possible employer of plaintiff; promise of temporal advantage or threat of temporal disadvantage.

Subdivision (5). Defendant by bringing temporal inducement to bear upon outsider (promise of gain to outsider or threat of loss to outsider), induces outsider to persuade (use simple persuasion on) possible employer of plaintiff.

Subdivision (6). Defendant, by offer of temporal inducement to outsider, induces outsider to offer temporal inducement to possible employer of plaintiff.

Subdivision (7). Defendant, by offer of temporal inducement to outsider number 1, induces outsider number 1 to offer temporal inducement to outsider number 2, to offer temporal inducement to possible employer of plaintiff.

As to (4), if we are right in the view heretofore expressed under Class 1, there is a *primâ facie* liability here. According to that view, what the outsider does here is a tort on his part against plaintiff; and the defendant is liable as one who consciously persuades another to commit a tort.

As to (5), if we are right under Class 1, the defendant has here used a tortious method to induce the outsider to influence the employer; and hence is liable.

As to (6), if we are right in our views under Class 1, *ante*, then defendant is liable here on both the foregoing grounds; on the reasons suggested as to (4) as well as on the reasons suggested as to (5).

Suppose, however, that we are not right under Class 1; is there any other ground on which an action can be allowed in (4), (5), or (6)? We think there is. The difference between Class 1 and the latter cases is very great. The consequences to the plaintiff are likely to be much more serious. An outsider is brought in, who would otherwise have remained neutral; and either his action, or the method by which the defendant procures him to act, involves temporal inducements. At all events an action should lie in (6) where *both* elements are present; temporal inducement being involved both as to the method of bringing in the outsider, and in his own action after he enters the fray. And if the action lies in (6), then *a fortiori* it lies in (7).

In the cases under Class 1, the defendant influences the conduct of only one person, C. The only means or lever used to influence that person is a threat as to the future conduct of the defendant himself, a threat of loss which would result to C from the conduct of the defendant alone.

In subdivision (6) under Class 2, the defendant influences the conduct of two other persons, one of whom is an entire stranger to the controversy; and he uses the second to influence the first. If he can do this, then he can, as in (7), influence a third person to influence the second; or influence an indefinite number in succession to influence each other in turn. He can drag the whole community into his dispute.

Subdivision (8). The temporal inducement offered to possible employer of plaintiff (offered either by defendant or by one or more outsiders at defendant's instigation) consists of a threat, not only to cease dealing with the employer, but also to cease dealing with any one who deals with the employer as to any matter whatever.

In (8) the inducement used is, in effect, a threat to deprive the possible employer of the means of livelihood, to prevent him from earning money or from purchasing food. Such a threat can be carried out "to the degree of a person being starved." Whether there can be any possible justification for such a threat is a question to be considered later. But that this method of inducement is, at least, *primâ facie* tortious seems clear.

Subdivision (9). The temporal inducement offered to possible employer of plaintiff consists in a threat of defendant to *order* another person to cease dealing with possible employer of plaintiff; the other person being one who is *de facto* under defendant's control, and who would obey the order if given by defendant. (Or assume that the order is given and obeyed; and that thereupon the employer discharges plaintiff in order to thereby obtain a revocation of the order.)

Subdivision (9) differs altogether from (1). He who gives a positive command which is obeyed cannot then say that he has merely *persuaded* the actor (the recipient of his order). The person who thus acts by the hand of another is in law responsible for the consequences. He cannot plead that it was wrong or foolish in the actor to obey him. That was the precise result which he desired.

The following topics remain to be considered:

1. Whether the members of a combination are liable for causing damage, if a single individual accomplishing the same result by the same method would not be liable?

2. What constitutes a justification?

3. Whether bad motive operates as a rebuttal of an otherwise sufficient justification?

Jeremiah Smith.

[*To be continued.*]